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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 241

MOTORS INSURANCE CORPORATION, a corporation, THE AVONDALE MOTOR CAR COMPANY, a corporation, and JOHN L. CASHMAN, for themselves and others similarly situated,

Plaintiffs-Appellants,

vs.

WALTER A. ROBINSON, as Superintendent of Insurance of Ohio and WILLIAM HARPER ANNAT, as Director of Commerce of Ohio,

Defendants-Appellees.

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM.

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I.

Appellees' Statement confuses and fails to meet the issues presented.

Appellees' Statement confuses the issues in the following respects:

A. Appellees assert, contrary to the petition, that appellant dealer-agents have insured themselves or their

employees or employers. They say ("The Facts", third par.):

> "substantially all of the business written by these agents was upon automobiles which were *owned or* sold by them, or their employees or employer. Paragraph 17 (h) of the appellants' petition admits this fact." (Emphasis supplied—see also "Statement of Issues on Appeal", first par.)

But the very petition paragraph to which appellees refer states that

> "The plaintiff agents and those whom they represent admit that the principal use of their licenses has been to place insurance upon motor vehicles which they have sold." (See also petition par. 17(b), cited by appellees.)

Petition paragraph 14 states the negative:

> "In no instance has any policy of insurance solicited and placed by the plaintiff agents and those whom they represent named as a party insured the agent soliciting or placing such insurance or the employer of such agent."

Finally, the prayer for injunctive relief was limited to revocation of, or refusal to grant or renew licenses

> "upon the sole ground that the principal use of such licenses has been or will be to * * * place or effect insurance covering solely the interests of persons * * * other than such licensees, or their employes or employers, in motor vehicles which such licensees, or their employes or employers, have sold or are selling."

Had the dealer-agents used their licenses principally to insure themselves or their employees or employers with

respect to their own property or other insurable interests, their licenses properly would have been revoked and there would have been no lawsuit.

B. Appellees assert that "The Ohio Courts found that appellants' agents * * * were 'vendors' within the meaning of these statutes * * *". The Ohio Courts "found" no such thing because that was not disputed. The basic construction issue was the identity of the insured person contemplated by the statutory phrase:

> "property * * * for which * * * [the insurance agent or his] relatives, employers or employees * * * is * * * vendor * * *".

The effect of the statutes as construed and applied is to treat that clause as referring to the *vendee* as the insured person—thus immediately raising the constitutional issues which are presented here.

C. Although, by virtue of the demurrer, there is nothing before the Court except the allegations of the petition and facts which may be judicially known, appellees inject wholly irrelevant and, in some instances, inaccurate matter *dehors* this record. Appellees' statement that hearings were held to determine the suitability of certain dealer applicants for licenses, appellees' paraphrase of their testimony, and appellees' account of the "cautioning" by the Superintendent of Insurance respecting the checking of their production records are not matters of record here and are not accurately presented. Even if the facts with respect to these matters were as appellees have stated them, they would be irrelevant to the issues of statutory construction and constitutional law which are raised by the petition and the demurrer. Also beyond the record and irrelevant are

the figures respecting the volume of business done by the Farm Bureau Mutual Auto Insurance Company and the 1950 net premium income of Motors Insurance Corporation.

D. Appellees state:

> "Thus, it would appear that unless plantiffs-appellants can show affirmatively that there is no basis for the statutory provisions in question, the acts of the legislature will have withstood their challenge."

But appellants here challenge the constitutional validity of the construction and application of the statutes—not the statutes themselves. In this connection, in *State ex rel Allstate Ins. Co.* v. *Bowen,* 130 Ohio St. 347, 199 N. E. 355, cited by appellees, the validity of *different* provisions of Section 644 in its *prior* form (before addition in 1935 of the principal use provision) was involved.

II.

The statutes involved do not touch the evils asserted by appellees in justification of their interpretation.

Appellees repeatedly refer to "controlled business" as the subject of the Ohio legislation in question, but do not define the term. Appellants, in discussing the questions of statutory construction in the State Courts, agreed that the Ohio statutes are a species of so-called "controlled business" legislation, identical in purpose and scope with that of numerous statutes elsewhere. But appellants disagree with appellees as to the accepted meaning of the term. (See III, *infra.*)

A. Appellees assert that the "preeminent" evil against which the Ohio statutes are aimed was

> "the situation which existed during the automobile shortage when the purchaser was at the mercy of the dealer, and was required to take the automobile loaded with unwanted accessories, including insurance coverage when the dealer had a licensed agent available."

That this assertion is no more than a figment of the imagination is shown by the following:

1. As pointed out in appellants' jurisdictional statement, this could not have been a legislative purpose at the time of enactment because the principal use provision, the construction and application of which are challenged, was enacted in 1935 when there was not and never theretofore had been any automobile shortage.

2. The statutes (as distinguished from the challenged construction) are, as appellees say, "not limited in scope to automobile dealers"—so it is impossible to assume, as do appellees, that an evil peculiar to the automobile business was the object of the legislation.

3. The fact is, as the jurisdictional statement shows, that Section 9589-5 of the Ohio General Code makes it a criminal offense, and a cause in itself for license revocation, for the purchase of insurance from a particular company or agent to be made a condition precedent to the sale or financing of property.

4. The principal use test, as interpreted and applied by appellees, is not only not "a perfect cure" for this alleged

"preeminent" evil: It is no cure at all—it is not rational even as a palliative.

5. Finally, and conclusively, the Common Pleas Court, whose opinion[1] stands as the only authoritative voice of the state in the premises, found no such "preeminent evil" and declared an entirely different purpose of the statutes, as shown in the jurisdictional statement. The purpose so found and declared,

> "to prevent an unfair advantage in the placing of insurance and the licensing of persons who were not intending to do a general insurance business, but simply to supplement their primary business of selling automobiles"

was carried ruthlessly into effect by the appellees; and it is that purpose, and the manner and effect of its implementation, of which appellants complain as an invasion of their Federal constitutional rights.

Appellees would apparently have this Court infer that the appellant dealer-agents and those represented by them had been engaging in "tie-in" practices from the admitted fact that the principal use of their licenses had been to insure their car purchasers.

But the petition alleges (par. 11) and the demurrer admits that

> "Such agents may not make the placement of such insurance with said Motors Insurance Corporation a condition of such sales or of any sale or of such financing. *An option* of procuring such insurance through an agent and in a company of such a pur-

[1] This opinion is now unofficially reported in 106 N. E. 2d 572. The opinion of the Court of Appeals of Franklin County and the judgment of the Ohio Supreme Court may be found, respectively, in 106 N. E. 2d 581 and 105 N. E. 2d 61.

> chaser's choice is given every such purchaser. However, in most cases such *installment* purchasers in Ohio have elected to insure with said Motors Insurance Corporation." (Emphasis supplied.)

In this connection there is an obvious *non sequitur* implicit in appellees' statement: To say that the dealer-agents had placed most of their insurance for purchasers of cars from them or their employees is a very different thing from saying that most or all of their car purchasers took insurance from them. (See also appellees' statement that

> "the principal use of their licenses has been to place insurance upon motor vehicles which they *have* sold, *as in fact it was almost 100%.*" Emphasis supplied.)

B. The second claimed evil on appellees' list is monopoly. The state trial court did make a passing and speculative reference to monopoly; but, as the jurisdictional statement indicates, that reference is an obvious makeweight, inconsistent with the framework of the statutes and wholly without factual basis. Although irrelevant to the issues, appellees attempt to supply a factual basis by referring to the net premium volume of Motors Insurance Corporation's Ohio business in its first year, as set forth in the petition. Here is another *non sequitur*, inasmuch as this volume is not compared with the total of all companies for the same period, nor with the total premium volume of insurance covering owners of cars purchased from appellants and those represented by them. Without such a comparison, the 1949 Ohio net premium volume of Motors Insurance Corporation is meaningless, beyond showing a considerable measure of public acceptance of the company's insurance. Nor is the defect in appellees' reasoning cured

by the off-the-record comparison of Motors Insurance Corporation's 1949 net premium volume with that of another company for the same year, or with that of Motors Insurance Corporation for a subsequent year. The same *non sequitur* is present in each case. If the courts are to take judicial notice of such irrelevant facts at all, the whole official statistical picture should be brought in and considered. If that were done, appellants apprehend that no suggestion of "monopoly" would emerge; indeed, appellants did precisely that in arguing to the Common Pleas Court: They produced official and semi-official statistics for 1949 showing that Motors Insurance Corporation achieved less than 2% of the total potential Ohio new car market and less than 16% of the potential Ohio market for new General Motors vehicles.

C. Appellees say:

> "*Another reason* for the principal use test is found in Section 644, which • • • [prescribes] that the applicant 'intends to hold himself out in good faith as an agent'. The principal use • • • is *one* of the tests • • • to determine whether or not a person is an agent in 'good faith'." (Emphasis supplied.)

Without stopping to point out, as appellants did below, that the Courts of Ohio, in other cases, have held that the principal use test is not merely "one of the tests" of holding out in good faith, but the *only* one, the question in this Court is: If sought to be justified as a measure of "holding out in good faith", is appellees' construction and application of the principal use test constitutionally valid? That being the only question here relevant, appellants respectfully submit that appellees' reference to "good faith" as an *additional* objective of the statutes begs the constitutional questions.

III.

Legislation of other states affords no support for the constitutional validity of appellees' construction and application of the Ohio statutes.

Appellees cite as precedents for the Ohio legislation as construed and applied by them a number of state statutes and say that such state statutes require

> "an insurance agent (1) to write no more than a maximum percentage of business on *specified risks* and (2) to be actively engaged in the insurance business with the general public." (Emphasis supplied.)

Actually, as the terms of the state statutes quoted by appellees and numerous other statutes which might be cited[2] show, "actively engaged in the insurance business with the general public" is in every case merely the affirmative converse of the requirement "to write no more than a maximum percentage of business on specified risks"; and it is important to observe what the "specified risks" mentioned in these statutes are.

With the exception of the Texas statute, all such statutes deal with so-called "controlled business" in the sense in which the appellants, in the state courts, argued that that trade phrase should be understood if used to describe the Ohio statutes, namely, insurance written for the agent himself, which, by virtue of his commissions, he obtains at a

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[2] California, Deering's Calif. Code, Ann., Insurance, Vol. 1, Sec. 760 (Div. 1, Pt. 2, Ch. 1, Art. 5); Connecticut, Sec. 6060, General Statutes; Florida, Chapt. 27, Sec. 627.05(4) Florida Statutes; Georgia, Sec. 56-508, Code; Illinois, Smith-Hurd Ann. Ill. Statutes, Ch. 73, Insurance, Sec. 1065.55 (Laws of Ill., 1949, p. 1032 at p. 1038, Sec. 508); Kentucky Chapt. 21, Sec. 1, Revised Statutes, 1950; North Carolina, Chapt. 58, Sec. 58-41, General Statutes; Utah, Sec. 43-17-23, Utah Code (1951 Supp. p. 229); Virginia, Title 38, Sec. 38-83, Code of 1950; Washington, Revised Code, Sec. 48. 17.080 (Vol. 4, p. 3815).

discriminatorily low cost or that written for persons in close association with him either economically or socially whereby he acts rather in the guise of their representative than in the guise of a representative of the company: All apply the maximum percentage or principal use test to business of one or both of these classes irrespective of whether the agent had any *control over the placing* of that business; and none extends the description of "specified risks", so limited in percentage, to include the interests of persons to whom the agent or his employer or relative had sold the subject matter of the insurance. This is apparent from the very quotations made by appellees, except in the case of the New York statute; and it would have been apparent in that case also if appellees had quoted the statute sufficiently to reveal the "certain specified sources". The Texas statute, when it speaks of "control", is fundamentally different: There, the statutory term "control" is used in its ordinary sense as meaning *control over "the placing"* of the proscribed percentage of insurance business in the named relationships or transactions. *Board of Insurance Commissioners* v. *Duncan,* 174 S. W. (2d) 326 (Texas Civil Appeals, 1943, appeal to Supreme Court denied).

So these statutes of states other than Ohio are not precedents for the interpretation and application given to the Ohio statutes by the appellees; rather they are precedents for the interpretation of the Ohio statutes for which the appellants unsuccessfully contended in the state courts.

The Ohio statutes, as construed and applied by the appellees, are completely unique in restricting the proportion of insurance business which the agent may place for third persons solely because they purchased the subjects of insurance from the agent; and their practical effect in wholly denying the privilege or right of licensure as insur-

ance agents to automobile dealers is without precedent elsewhere.

In this connection it should be observed that the quotation from *Odle* v. *McCormack*, 185 Tenn. 439, 206 S. W. (2d) 416, 421, represents not the Tennessee statute, but a former, so-called "official" ruling of the Tennessee Division of Insurance which, as the report of the cited case would show, was not approved by the Supreme Court of Tennessee. A subsequent amendment of the Tennessee statute makes it clear that the concept of being actively engaged in the general insurance business with the general public is merely the obverse of not writing insurance principally for the agent himself or those in close association with him.[3]

Thus, even were a dealer-agent to confine his insurance solicitations and placements to his car purchaser market, he would still be "holding himself out in good faith as an insurance agent" and be "actively engaged in the insurance business with the general public".

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[3] Section 6236.59, Williams Annotated Code of Tennessee (Tennessee Laws, 1951, Ch. 84, Sec. 7), includes as a ground of revocation, etc.: "That the respondent is not actively engaged in the general insurance business, or a particular class or classes thereof, with the general public, *in that* the premium writings of the respondent, represented by the premiums or contracts of insurance obtained, signed, countersigned or issued by him for the general public do not exceed those on contracts of insurance obtained, signed, countersigned or issued by him covering his own property or insurable interests and that of his relatives and his employer; provided that, for the purposes of this paragraph B, liens, mortgages, titles retained by the seller in conditional sales contracts, or other interests in property held as security for debt, shall not be deemed property or insurable interests."

See also Section 6236.46, paragraph numbered "(9)" of the Tennessee Code governing life insurance agents, which provides: "Has obtained, or attempted to obtain such license, not for the purpose of *holding himself out to the general public as an agent, but primarily* for the purpose of soliciting, negotiating or procuring insurance or annuity contracts covering himself or members of his family, or the officers, directors, stockholders, partners, employees, of a partnership association, or corporation of which he or a member of his family is an officer, director, stockholder, partner or employee."

IV.

The constitutional issues are practical — not theoretical.

In discussing the constitutional issues appellees rightly say that the statutes themselves

> "are not limited in scope to automobile dealers. They cover all persons whether they be automobile dealers, real estate men or others. They *apply* to all persons alike."

But, as the jurisdictional statement makes plain, appellants are not complaining of any want of due process or denial of the equal protection of the laws which appears on the face of the statutes. The constitutional issues relate to the manner in which these Ohio statutes have been construed and applied by the appellees, in the light of the facts alleged in the petition and others so notorious as to be subject to judicial notice. Repeating in substance what was said in the jurisdictional statement, the fact is that because the automobile is in a class by itself as a subject of insurance and because a considerable portion of the automobiles which are distributed in Ohio and elsewhere are sold on the installment plan, the interpretation and application given to the Ohio statutes by the appellees so operate practically as to invade the constitutional rights of the appellants and those whom they represent. It is because of these facts that the insurance business of agents engaged in selling automobiles is actually destroyed by the construction and application of the statutes in question. The appellants are here raising questions of substance and not of form.

It is possible that other classes of persons, such as real estate agents, may be injured in their constitutional rights

by the construction and application of the Ohio statutes. The appellants are not claiming and are not required to claim that automobile dealers and their employes are the only victims of what they conceive to be a denial of the equal protection of the law. But they do assert that because of the nature of the automobile sales business, on the one hand, and of the peculiar nature of the automobile itself as a subject of insurance, on the other, automobile dealers and their employes are the victims of an unconstitutional construction and application of the state statutes.

One sentence in this part of appellees' statement might create the inference that appellants, in showing that the rigid and mechanical manner in which appellees apply the principal use test is in itself a violation of their constitutional rights, are merely charging abuse of official discretion. This is not so. As shown by the petition (par. 16), appellees, in making the rulings complained of, disclaimed any discretion in applying the mathematical formula.

V.

Daniel v. *Family Security Life Insurance Company* is not controlling.

The wide and fundamental distinction between the problem involved in *Daniel* v. *Family Security Life Insurance Company*, 336 U. S. 220, and that brought to the Court by the present appeal has been adverted to in the statement as to jurisdiction. The parallel statement attempted by the appellees to show the "amazing similarity" of the two is wholly superficial in that it does not so much as mention the distinguishing characteristic. That distinguishing characteristic lies in the fact that the South Carolina statute was palpably aimed at a generally recognized evil—the opportunity afforded to an undertaker, transmitting as insurance

agent the proceeds of a burial insurance policy, to obtain for himself the funeral business and to overpersuade the bereaved beneficiary to order an extravagant funeral. No comparable evil could be imagined as an objective of the Ohio statute as construed and applied. Consistently with the South Carolina objective, that state's statute absolutely forbade the issuance of insurance agents' licenses to undertakers, whereas no such express prohibition is to be found in the Ohio statutes, which, as pointed out in the jurisdictional statement, assume the propriety of the contemporaneous conduct of the motor vehicle sales and insurance businesses.

Moreover, the parallel is at fault in certain other respects. The appellants do not claim, as implied by appellees, that Motors Insurance Corporation is "the only concern affected" by the appellees' interpretation and application of the Ohio statutes. The fact is that numerous other companies and individuals are affected (see appellants' application for a rehearing, filed in the Supreme Court of Ohio), although this is not pleaded in the petition, which is confined to a proper class.

Nor have the appellants complained that an "insurance lobby" obtained the enactment of the Ohio insurance statutes, although this may well have been the case. The appellants do allege in their petition (par. 17c) that the complaints lodged against certain Motors Insurance Corporation agents with the appellee, Superintendent of Insurance, and pursuant to which the rulings here complained of were first made, were lodged by the Ohio Association of Insurance Agents Inc., the very name of which should sufficiently indicate to this Court the nature and scope of the actual underlying competitive interests involved. But appellants ask no more than that the interpretation and application of the Ohio statutes, of which they here complain, be "judged by results".

Conclusion.

Appellants respectfully submit that appellees' motion to dismiss or affirm is not well taken and that the Court should deny the same and note probable jurisdiction.

Respectfully submitted,

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